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IN THE

Supreme Court of the United States

October Term, 1960
No. 36

TWO GUYS FROM HARRISON-ALLENTOWN INC.,

Appellant

v.

PAUL A. McGINLEY, District Attorney, County of Lehigh, Pennsylvania, and GEORGE J. JOSEPH, District Attorney, County of Lehigh, Pennsylvania, Substituted Additional Defendant,

Appellees

On Appeal From the Final Order of the United States District Court for the Eastern District of Pennsylvania

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the District Court for the Eastern District of Pennsylvania (R. 273-290) is reported at 179 F. Supp. 944.

JURISDICTION

This action was brought to have declared unconstitutional under the Fourteenth Amendment to the United States Constitution the Pennsylvania Act of June 24, 1939, Pamphlet Laws 872, §699.4, 18 Pa. Stat. Ann. §4699.4, and the Pennsylvania Act of August 10, 1959, Pamphlet Laws 660, 18 Pa. Stat. Ann. §4699.10. Because the constitutionality of a state statute was questioned and injunctive relief was requested, a three-judge district court was convened pursuant to 28 U.S.C. §2281 and 28 U.S.C. §2284. The final order of the District Court was entered on December 7, 1959. Appellant's Notice of Appeal was filed on December 18, 1959, and its Jurisdictional Statement on February 12, 1960. Probable jurisdiction was noted on April 25, 1960. The jurisdiction of this Court rests upon 28 U.S.C. §1253 and 28 U.S.C. §2101(b).

STATUTES INVOLVED

The statutes involved in this case are two Pennsylvania acts prohibiting certain activities on Sunday. The first is the Act of June 24, 1939, Pamphlet Laws 872, §699.4, as amended, 18 Pa. Stat. Ann. §4699.4, substantially a codification of the Act of April 22, 1794, 3 Sm. L. 177. This statute presently reads as follows:

> "Whoever does or performs any worldly employment or business whatsoever on the Lord's Day, commonly called Sunday (works of necessity, charity and wholesome recreation excepted), or uses or practices any game, hunting, shooting, sport or diversion whatsoever on the same day not authorized by law, shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of four dollars ($4), for the use of the Commonwealth, or, in default of payment thereof, shall suffer six (6) days imprisonment.
>
> "As used in this section 'wholesome recreation' shall mean golf, tennis, boating, swimming, bowling, baseball, basketball, picnicking, shooting at inanimate objects and similar healthful or recreational exercises and activities.
>
> "Nothing herein contained shall be construed to prohibit the dressing of victuals in private families; bake-houses, lodging-houses, inns and other houses of entertainment for the use of so-

journers, travellers or strangers, or to prohibit the sale of newspapers, or to hinder watermen from landing their passengers, or ferrymen from carrying over the water travellers, or work in connection with the rendering of service by a public utility as defined by the act of May 28, 1937 (P. L. 1053), known as the 'Public Utility Law,' or persons removing with their families on the Lord's Day, commonly called Sunday, nor to the delivery of milk or the necessaries of life, before nine of the clock in the forenoon, nor after five of the clock in the afternoon of the same day."

Amendments made at the 1959 Session of the Pennsylvania General Assembly added the exceptions for wholesome recreation and public utility work seen in the above language. These were not present in the statute at the time of filing of the original complaint.

The second statute involved is the Act of August 10, 1959, Pamphlet Laws 660, §1, adding §699.10 to the Act of June 24, 1939, Pamphlet Laws 872, 18 Pa. Stat. Ann. §4699.10. The act states as follows:

"Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day, at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof

in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.

"Each separate sale or offer to sell shall constitute a separate offense.

"Information charging violations of this section shall be brought within seventy-two hours after the commission of the alleged offense and not thereatfer."

The provision of the Federal Constitution involved is that part of the first section of the Fourteenth Amendment which states as follows:

". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. Is the Pennsylvania Act of August 10, 1959, Pamphlet Laws 660, §1, a law respecting an establishment of religion and thus in violation of the Fourteenth Amendment to the United States Constitution?

2. Is the limitation of the applicability of the Pennsylvania Act of August 10, 1959, Pamphlet Laws 660, §1, to the sale at retail of certain specified goods and commodities an unreasonable limitation and thus violative of appellant's rights to due process of law and to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution?

3. Are the fines prescribed by the Pennsylvania Act of August 10, 1959, Pamphlet Laws 660, §1, oppressive and thus violative of appellant's right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution?

4. Was appellee McGinley's enforcement of the Pennsylvania Act of June 24, 1939, Pamphlet Laws 872, §699.4, against appellant arbitrary and discriminatory in violation of appellant's right to the equal protection of the laws as guaranteed by the Fourteenth Amendment to the United States Constitution?

5. Did the District Court err in refusing to pass upon the constitutionality of the Pennsylvania Act of June 24, 1939, Pamphlet Laws 872, §699.4?

STATEMENT

Appellant filed its original complaint on November 22, 1958 (R. 1). It alleged that the Pennsylvania Sunday Law (then, just the Act of June 24, 1939, Pamphlet Laws 872, §699.4) violated the Fourteenth Amendment to the Constitution of the United States because (a) it was unreasonably discriminatory and (b) it was an act respecting an establishment of religion (R. 2). It also alleged that appellee McGinley's enforcement of this law was arbitrary and, hence, similarly unconstitutional (R. 2). The relief prayed for was a declaration that both the statute and its enforcement were unconstitutional and the granting of an injunction (temporary until hearing and permanent thereafter) restraining appellee McGinley from arresting or threatening to arrest any of appellant's employees for violation of the Sunday law or for conspiracy to violate the same (R. 2-3). Appellant also asked for a temporary restraining order (R. 3) which request was immediately granted ex parte (R. 4).

Since appellant sought injunctive relief and alleged that a state statute was unconstitutional under the Federal Constitution, it was necessary to convene a district court of three judges. 28 U.S.C. §2281. This was subsequently done pursuant to 28 U.S.C. §2284.

On August 10, 1959, the Pennsylvania General Assembly enacted the second of the two statutes under attack here. This act was not an amendment to the

earlier provision, but was an addition to The Penal Code of June 24, 1939, itself.

Appellant then filed its amended complaint (R. 5-7), similarly attacking the validity of this new act. To this appellee McGinley's answer was filed (R. 8-10). Appellant then received a temporary restraining order with regard to the 1959 act (R. 10-11), following a hearing (R. 11-42).

The final hearing was held on October 13, 1959 (R. 43-257). At the hearing appellant presented the testimony of Dr. Sidney B. Hoenig of Yeshwa University (R. 57) concerning the origin, development and effect of Sunday observance and legislation. In summary form, Dr. Hoenig's testimony indicated that the seventh day of the week or Saturday is the Sabbath day and the day of rest of the Jews (R. 58-60), that Sunday observance arose to commemorate the resurrection of Jesus which occurred on the first day of the week (R. 61-62), that Sunday was referred to as the Lord's Day and was not originally observed as a day of rest (R. 63).

Dr. Hoenig went on to testify that enforced Sunday observance was first decreed by the Roman Emperor Constantine (R. 66-68) although no connotation of Sunday as a day of rest really appeared until several centuries later (R. 69-71). Today, Dr. Hoenig felt that to compel a Jew to observe Sunday is to force a Christian observance upon him (R. 73).

In exploring the Jewish notion of the Fourth Commandment on cross-examination, Dr. Hoenig indicated that Sabbath observance was the vital thing (R. 77) and that the command to work on the other

six days was not an inflexible injunction to carry out one's usual activities throughout the six days (R. 76-77). Thus, for example, the campaign for a five-day work week (Monday through Friday) has not been objected to (R. 77) as long as Sunday is spent in doing something of social value (R. 77). Thus, again, an orthodox Jewish shopkeeper need not keep his shop open on Sunday (R. 77-78).

Dr. Hoenig recognized that contemporary environmental circumstances have led to a situation where many Jews do not and would not work on Sunday voluntarily (R. 79) and that many Jews are unaware of the historical significance of Sunday (R. 81-82). However, he insisted that compulsory restraint is obnoxious to the Jew (R. 79) and that a Jew is affected by compulsory observance of the Lord's Day (R. 80).

Elder Robert L. Odom of the General Conference of Seventh Day Adventists also was presented by appellant as an expert witness concerning Sabbath and Sunday observance. In general, his testimony (R. 83-92) paralleled Dr. Hoenig's although he exhibited a somewhat stronger sense of interference with the beliefs of his people (R. 90).

The remainder of the testimony dealt with the particular activities of the present appellant and with appellant's attempt to prove discriminatory enforcement of Pennsylvania's 1939 Sunday Law by appellee McGinley. Appellee's brief deals with this issue in two short paragraphs (pp. 41-42), stating simply that "The Record makes it clear . . ." that such discrimination occurred. On the other hand, the court below pointed out in its opinion (R. 284-285) that be-

ginning in 1957 appellee McGinley made efforts to enforce the 1939 Sunday Law against numerous retail stores, including plaintiff's. The 1959 law, of course, is not here involved since McGinley was restrained from enforcing it by court order before it took effect.

The Record tells the story. Appellant opened its store in the area of Allentown, Pennsylvania, in October, 1957 (R. 97), having chosen that locale in the belief that it could remain open on Sunday (R. 97-98) and with full intent to do so (R. 97-98) even though it was aware of the existence of the 1939 Sunday Law (R. 99). Its position was that since this law was not being enforced to its knowledge, it could open on Sunday without interference (R. 99).

Appellant's employees, subsequent to its opening, were arrested by McGinley (R. 130) who was confronted with a situation of spreading defiance of the law by retail stores (R. 131). Arrests were made at other stores as well (R. 129-130). The appellant continued to remain open on Sundays (R. 131) although most other establishments closed (R. 132). McGinley continued to make arrests of appellant's employees for approximately one year (R. 112) until the present action was begun (R. 113).

On the other hand, McGinley freely admitted that industrial enterprises were open to a degree on Sunday (R. 133-134) and that recreational and communications activities were conducted (R. 134, 165). These continued without interference (R. 134-135).

Appellant also introduced testimony on this phase of the case which, it alleged, showed that McGinley had been improperly induced to enforce the law against appellant by a competitor. Two points were

advanced: (1) that this competitor paid some private legal fees to McGinley and (2) that McGinley profited from a real estate transaction involving this competitor (R. 156-160). McGinley freely discussed these matters, also (R. 135-136, 137-141).

Following this final hearing and the usual submissions (R. 258-273), briefs and argument, the District Court dismissed appellant's complaint (R. 298-299). This appeal followed (R. 300-302).

SUMMARY OF ARGUMENT

By prohibiting Congress and the states from enacting any law respecting an establishment of religion, the First and Fourteenth Amendments to the Federal Constitution provide a rule of law designed to further one of our fundamental democratic institutions. While disagreement over the original intent and meaning of this clause has been pronounced, this Court has read the clause broadly and has refused to read it simply as a barrier against creation of an actual state religion. Nevertheless, the Court has also indicated that government and religion are not enemies and that the state may accommodate its institutions to religous observance. In this respect the Court has applied a rule of reason to its broad interpretation of the establishment clause and has not implied that every official manifestation of religious belief and observance—of which there are a multitude—in our society must be rooted out.

Thus, we find evidence of religion's influence both in federal and state laws, laws which have existed for years without being considered violative of the Constitution. The Court has referred to them in its opinions and cannot be said to be unaware of them. The continued vitality of these examples of religious feeling confirm the above conclusion that reason must govern the application of the establishment clause. At the very least, those practices which are either simply trivial or are in themselves aids to the free exercise of religion should be sustained and the con-

stitutional prohibition applied to eliminate only those laws which restrict the free exercise of religion by making actual worship more difficult or which lend state authority or financial aid directly to the cause of religion.

Sunday laws have a long history. They have existed in Pennsylvania since the founding by William Penn in 1682. Yet, Pennsylvania has never supported an established church, unlike most of the original thirteen colonies. The contrary is the case. Pennsylvania was founded as a haven for religious freedom, and its tolerance of Sunday laws can only be understood in this context. These laws were enacted plainly to permit Pennsylvania's citizens to enjoy better the freedom they found in that state. It would be incongruous to hold these laws to be an establishment of religion when the very life of the state was devoted to an exactly opposite principle, a principle which has found direct expression in the Commonwealth's basic charter of government; for since at least 1790 Pennsylvania's Constitutions have barred state interference with matters of conscience.

Moreover, Sunday laws have long been sustained, even by this Court, as laws regulatory of civil matters and not as religious laws at all. Pennsylvania's courts, too, have pointed out that the legislature may act to safeguard the health of the people by requiring a day of rest and relaxation away from one's usual daily labor. That the day usually chosen coincides with the day most persons observe as a day of religious devotion is hardly reason to interfere with the legislative choice even though alternatives exist. Each alternative itself bears many defects, defects

which in some cases appear much more deleterious to the existence and beneficial interplay of beliefs and practices so vital to our democracy.

Any attack upon the classification of prohibited activity contained in the Sunday laws faces a heavy burden of proof, a burden rendered doubly difficult here by the presence of a rational basis for enactment of Pennsylvania's 1959 statute. The District Court agreed that this basis existed and refused to interfere. This Court itself has held that the legislature may act against an evil found to exist even if others remain untouched, that the only bar of the Equal Protection clause is to the invidious discrimination, a bar not crossed here. Similarly, the greater penalties of the 1959 law stem from the reasonable need to deter violations of law without terrorizing potential violators from their right to test the validity of the law. Appellant has not even made an argument on this issue.

Appellant's argument with respect to its allegation of arbitrary and unequal enforcement of law, directed at appellee McGinley, is also largely unexplained by it. This phase of the case is no longer a proper point of discussion anyway for McGinley's term of office expired on January 4, 1960. As against him personally this suit for an injunction has abated, and no statute or rule of court permits it to continue despite appellant's attempt to keep him as a party. Appellant has disclaimed any fear of unequal enforcement from appellee Joseph, who succeeded McGinley; so an injunction based upon this allegation cannot properly be granted against either appellee. On this point, then, the Court is faced with nothing but a request for an advisory opinion after the event.

Even upon the merits of this argument, no finding of discrimination is justified. McGinley enforced the Sunday law of 1939 as best he could in an atmosphere of spreading violations until restrained from further enforcement by the courts. He did not achieve one hundred per cent enforcement, but what remained untouched did not result from any purposeful and arbitrary conduct. Nor are appellant's insinuations that one of its competitors improperly induced McGinley to act against appellant entitled to any credence. They are conjured up from a few instances of business and professional dealings between McGinley and the competitor, instances wholly open, wholly permissible and wholly proper in every respect.

Finally, the District Court's determination that it need not and should not pass upon the 1939 statute in view of the passage of the 1959 law was a perfectly reasonable decision in light of the probable supersession of the former by the latter where they both applied and, primarily, in light of the District Court's explicit finding that appellant was under no jeopardy from or even threat of enforcement of the earlier act. The court below acted with proper and laudable restraint and discretion in this decision.

ARGUMENT

I. THE PENNSYLVANIA SUNDAY LAWS ARE NOT LAWS RESPECTING AN ESTABLISHMENT OF RELIGION IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. The Establishment Clause Does Not and Has Never Been Interpreted or Appled To Extirpate All Recognition of Religious Faith From Our Laws and Practices

Any discussion of Sunday laws in the year 1960 raises an historical specter of frightening proportions Essentially, the problem is this: although Sunday laws have been a part of the life of this nation from the earliest Colonial times, the historical documents usually referred to in order to ascertain the thoughts and intentions of the framers of our Constitutional provisions are utterly devoid of reference to such laws. The importance of history in the present context cannot be overstated, for it seems wholly reasonable to conclude that such laws, familiar prior to 1789 and enduring ever since that time, somehow failed to impress themselves upon thoughtful minds as laws weakening the separation of church and state.

It is agreed, of course, that only the Federal Government was originally affected by the prohibition against establishment contained in the First Amend-

ment. It is also undisputed that the passage of the Fourteenth Amendment caused this restriction to become applicable to the states and that this application was not clearly defined until this Court's decision in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). There has been much dispute, however, as to the meaning of the "establishment" clause, a meaning which must be based in history and explained similarly under both the First and Fourteenth Amendments in a way consistent with history. The problem has been well stated by Alexander Bickel:

> "For only a society that strives to attain truth through reason is fit to enjoy freedom of speech. Such a freedom bestowed by judges who rest it on a historical hypothesis suspected of being (or known to be) erroneous carries the fault of a profound inner contradiction and is a very uncertain blessing. We require to know, as accurately as may be, whence we come, and to be aware that it is our own reasoned will, not some idealized ancestral compulsion, that moves us forward."[1]

No less a need governs when religious establishment is the issue.

The story of the mutations of the First Amendment, as it wound its way through the First Congress, is a familiar one. Madison initially introduced the presently pertinent clause in the following form:

> "... The civil rights of none shall be abridged on account of religious belief or worship, nor

[1] Bickel, *Book Review, The New Republic*, July 18, 1960, p. 15.

> shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed" I *Annals of Congress* 451.

Over two months later the provision was reported from committee:

> ". . . no religion shall be established by law, nor shall the equal rights of conscience be infringed." I *Annals of Congress* 757.

In addressing himself to this language, Madison said he thought it meant that "Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience."[2]

Mr. Livermore, however, succeeded in broadening the amendment to the following:

> "Congress shall make no laws touching religion, or infringing the rights of conscience." I *Annals of Congress* 759

But once again, on motion by Ames, the wording was altered:

> "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience." I *Annals of Congress* 796

From this the Conference Committee derived the final form of the Amendment's language:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

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[2] I *Annals of Congress* 758-9.

Obviously, the meaning of both "establishment" and "religion" are critical to any understanding of this clause. Superficially, it would appear that the provision was meant to guard against the creation of and support by Congress of a national church. Historically, the reference to "establishment" was a familiar one; the colonies were founded largely to escape "the Establishment", the Church of England. If this be so, then it is clear that the First Amendment was designed not to strike down every manifestation of religion in law but only to prevent a church or sect from being unduly exalted. This position has received scholarly support.[3]

However, his Court has apparently rejected this reading of the clause. It seems clear that the opinion in *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, expressly refused to narrow the sweeping language of the prior decision in *Everson v. Board of Education*, 330 U.S. 1, which included, in Justice Rutledge's opinion, an historical exegesis imparting broad meaning to the "establishment" clause. The result, too, has found a scholar's approval.[4]

If we are not disposed, then, to reopen and reargue the original meaning of this clause, what remains unanswered? First, the three great decisions of recent times—*Everson*, *McCollum* and *Zorich*—cannot be ignored. Second, the prevalance of a multitude of religious manifestations in our public lives are too obvious to escape attention and must be harmonized with our constitutional doctrine.

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[3] Corwin, *The Supreme Court As National School Board*, 14 Law & Contemp. Prob. 3 (1949).

[4] Pfeffer, *Church and State: Something Less Than Separation*, 19 U. Chi. L. Rev. 1 (1951).

Everson v. Board of Education, 330 U.S. 1, brought to the Court a challenge to a state law allowing the expenditure of public funds for transportation of children to parochial schools. While the Court found no infringement of the establishment clause, it laid down a sweeping restriction on governmental aid to religion. Regarding the pre-1789 history of the American colonies, the Court found in Virginia's refusal to renew a tax levy for support of the established church and its subsequent passage of the Bill for Religious Liberty a clearly appropriate analogy to the First Amendment, particularly because of Madison's passionate participation in both legislative struggles. Paradoxically, it should be noted that the Bill for Religious Liberty contained a preamble which pronounced religious liberty to be based upon "God's plan"—an unabashedly religious sentiment upon which it seems hardly appropriate to base an opinion in 1947 that these early enactments were designed to protect irreligion and anti-religious sentiment as well as freedom to worship without state interference.

Be this as it may, the entire Court agreed with the analysis of principle and apparently subscribed to the heart of the opinion:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be pun-

> ished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations, or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state' . . . " 330 U.S. 1, 15-16.

A majority of the Court found that these words did not bar aid to everyone on a non-preferential basis. Justice Rutledge, writing for four dissenters, felt that it did and stated that the only surviving threat to separation of church and state lay in use of the taxing power to support religion.[3] Sunday laws, obviously, either lay far from his mind or simply did not seem to infringe the constitutional prohibition.

In discussing the determination by the New Jersey Legislature that a public purpose was served by the aid in question, the Court uttered some significant words:

> "The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need." 330 U.S. 1, 6.

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[3] 330 U.S. 1, 44.

This language, as well as the present case, is strangely foreshadowed by the words, also, of Justice Frankfurter, dissenting in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624:

> "That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion to the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority." 319 U.S. 624, 662.

Released time practices in the public school's concerned the Court in both *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, and *Zorach v. Clauson*, 343 U.S. 306. In the former religious instruction was offered in the public schools during the school day. This use of the state's compulsory education machinery was found to be too directly in aid of religion and violative of the establishment clause. On the other hand, the actual release from the school property of children who wanted religious instruction was found to be sufficiently different from Illinois' practice to permit the Court to uphold New York's law in the *Zorach* case.

These two cases indicate rather pointedly that the establishment question must necessarily be one of degree. Otherwise, the state would be sterilized in its attitude toward the religious sentiments of the people. Even Justice Frankfurter, who dissented in *Zorach*

pointed out in his concurring opinion in *McCollum* that not all released time programs may be struck down by a blanket ruling, that to the extent

> "'. . . some are manifestations merely of the free exercise of religion, they are quite outside the scope of judicial concern . . .'" 333 U.S. 203, 225.

It is this approach that Justice Douglas, speaking for the majority in *Zorach*, outlined:

> "The First Amendment, however, does not say that in every and all respects there should be a separation of Church and State. . . . Otherwise, the state and religion would be aliens to each other—hostile, suspicious and even unfriendly. . . . A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court'." 343 U.S. 306, 312-313.

> "We are a religious people whose institutions presupposes a Supreme Being . . . When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. . . . It [the government] may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction." 343 U.S. 306, 313-314.

The difficulty of extracting from these three opinions an easy answer to the Sunday law issue is comparable to the problem of deriving some relevant and applicable conclusion from the words of the founding fathers. Appellees submit that the establishment clause cannot be applied like disinfectant to prevent or give relief from each and every eruption, that while it may have been meant to do more than guard against a literal establishment of a church, it does not compel the abolition of every sign of devotion in public matters. Appellees believe that the establishment clause should most properly serve to eliminate from our lives those laws which tend either to restrict the free exercise of religion by placing non-preferred groups or individuals at a disadvantage in their actual freedom to worship or not to worship or to lend state authority or funds directly to further the cause of a sect, a religion or all religion.

Thus, aid in transporting all pupils to school neither restricts the right to worship or refrain therefrom nor aids religion to the exclusion of the non-religious belief. On the other hand, religious instruction in the schools during school hours lends state authority directly to the cause of religion, a factor not present where the child leaves the school and is free to attend elsewhere a class in religious instruction or to do something secular in nature.

Under this approach those manifestations of religion, legally sanctioned, which appear so often in the fabric of our society but do not inhibit one actually from following his personal desires and which do not directly promote religious observance may be constitutionally tolerated. A converse corollary to this

proposition would leave intact those laws which tend to further the free exercise of religion. Thus, federal laws providing for the compensation of the chaplain of the United States Senate[6] for the appointment of chaplains at the United States Military Academy[7] and the Air Force Academy[8] and for chaplains in the armed forces[9] infringe no constitutional requirements. Similarly, we tolerate federal laws exempting ministers of religion from military service[10] and religious foundations from income taxation.[11] In none of these things do we espy any particular threat to our religious freedoms, yet all display a certain degree of religious deference by government. In various ways all may be sustained either as laws which further the free exercise of religion or as laws evidencing practices so traditionally woven into our social fabric that any invidiously religious effect has long since disappeared or simply as laws whose religious overtones are too trivial to invite invalidation.

One final illustration of the pervasive nature of these matters in our laws is seen in the Federal Constitution itself. Art. I, § 7, states:

> "If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him . . . it shall become law unless Congress has adjourned."

Is this an invalid recognition of religion? Or is it simply a recogntion that even in a country guarantee-

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[6] 69 Stat. 499 (1955), 2 U.S.C. §61d.
[7] 70A Stat. 239 (1956), 10 U.S.C. §4337.
[8] 70A Stat. 562 (1956), 10 U.S.C. §9337.
[9] 70A Stat. 167, 322 (1956), 10 U.S.C. §§3064, 5576.
[10] 62 Stat. 609 (1948), 50 App. U.S.C. §456(g).
[11] Internal Revenue Code of 1954, §501(c)(3).

ing religious freedom, the practical consequences of having a majority adhere to one faith entail certain concomitant social, political and economic factors which cannot be avoided?

Sunday laws in the modern world certainly do not prevent one from attending the church of his choice or staying away from any church. They leave all persons free to worship or refrain therefrom, according to the individual choice. They represent no imparting of state authority or funds to aid religious observance. At most, they accommodate the social fabric to the free exercise of religion in a way most calculated to aid the majority of our citizens without compelling that majority to take any pro-religious action.[12] It may be that at the time of the Council of Laodicea Sunday observance represented a matter of religious dogma;[13] It may be that Puritan New England enforced Sunday religious observance strictly;[14] but it is equally true that in Pennsylvania today Sunday has lost any officially religious denotation it may once have had.[15]

Even one of the outstanding adherents of church-state separation has recognized that matters which advance freedom of conscience or which are too trivial

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[12] Sunday laws do not require church attendance or any special devotion.

[13] See Dr. Hoenig's testimony (R. 75).

[14] For a scholarly treatment of religion in colonial New England, see Miller, *The New England Mind—The 17th Century* (2d Ed. 1954) and *The New England Mind—From Colony to Province* (1953).

[15] It is even doubtful that Pennsylvania's Sunday laws ever were designed to "establish" religion: see Brief, I. B. infra.

to invoke judicial condemnation may be tolerated even if they appear to reflect official religion.[16] This same writer's indication that Madison did consider such practices as appointment of chaplains and tax exemptions as encroachments on the Constitution[17] reveals, also, that even Madison's views are not ipso facto determinative of the present issue; for it hardly seems possible that these examples should have endured for so long and not invite legal opposition.

In this context of the application of a general constitutional principle, not clearly defined in the light of a multitude of traditional practices, in the light of the lack of any threat to individual religious freedom and in the light of our general institutional recognition of a Supreme Being, to a centuries old statute which compels no worship or observance, can we now state that Pennsylvania has enacted a law respecting an establishment of religion? Appellees submit that we cannot and should not.

[16] Pfeffer, *Church and State · Something Less Than Separation*, 19 U. Chi. L. Rev. 1, 22-23.

[17] Id. at 23-24.

B. Pennsylvania's Sunday Laws Have Never Reflected Either in Intent or Operation an Establishment of Religion

At the time of the American Revolution nine of the thirteen colonies sheltered an established church: the Congregational, in Massachusetts, Connecticut and New Hampshire; the Anglican in Maryland, Virginia, North Carolina, South Carolina, Georgia and New York.[18] Rhode Island, New Jersey, Pennsylvania and Delaware, on the other hand, supported no church. By 1789 Maryland, New York and the South had disestablished; but New England establishment continued for several decades.[19]

Pennsylvania itself was founded to promote religious freedom; and as Sweet points out, no other colony was as attractive a haven for the various sects or gave them as much latitude in working out their diverse views.[20] The early history of the Commonwealth hardly reveals the Puritan approach; and while the early laws reflect a positive Christian orientation, it must be remembered that there were few Jews in Pennsylvania at its founding.[21]

[18] Sweet, W. W., *The Story of Religion in America* (1939) 274.

[19] Id. at 275.

[20] Id. at 145-171.

[21] See Dunaway, *History of Pennsylvania* (2d Ed. 1948) 295 and Wolf & Whitman, *The History of the Jews of Philadelphia from Colonial Times to the Age of Jackson* 12-15.

For example, the first Frame of the Government drafted by William Penn and promulgated on April 25, 1682,[22] contained simply the following:

> "Twenty-second. That as often as any day of the month, mentioned in any article of this charter, shall fall upon the first day of the week, commonly called the Lord's Day, the business appointed for that day, shall be deferred till next day, unless in case of emergency."

This was soon followed by several provisions of law agreed upon in England on May 5, 1682:

> "Thirty-fifth. That all persons living in this province, who confess and acknowledge the one almighty and eternal God, to be the creator, upholder and ruler of the world, and that hold themselves obliged in concience [sic] to live peaceably and justly in civil society, shall in no ways be molested or prejudiced for their religious persuasion or practice in matters of faith or worship, nor shall they be compelled at any time to frequent or maintain any religious worship, place or ministry whatever.
>
> "Thirty-six. That according to the good example of primitive Christians, and for the ease of the creation, every first day of the week, called the Lord's Day, people shall abstain from their common daily labour, that they may the better dispose themselves to worship God according to their understandings."

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[22] The standard sources of the earliest Pennsylvania laws are the *Duke of York's Book of Laws*, 1676-1682, *and the Charter and Laws of the Province of Pennsylvania*, 1682-1700 (1879).

While an atheist might well feel mistreated by these laws today, the problem did not arise at the time; and it is obvious that these enactments provided a basic pattern for the free exercise of religion. Required Sunday abstinence from daily labor reflected only a furtherance of the State's desire to provide freedom of conscience for its residents, not an enforced observance of a religious ceremony.

The Great Law of December 7, 1682, expanded these two concepts:

> "Chap. I • • • That no person, now, or at any time hereafter, living in this Province, who shall confess and acknowledge one Almighty God to be the Creator, Upholder and Ruler of the world, and who professes, him, or herself obliged in Conscience to live peaceably and quietly under the civil government, shall in any case be molested or prejudiced for his, or her Conscientious persuasion or practice. Nor shall hee or shee at any time be compelled to frequent or Maintain anie religious worship, place or Ministry whatever, Contrary to his, or her mind, but shall freely and fully enjoy his, or her, Christian Liberty in that respect, without any Interruption or reflection. And if any person shall abuse or deride any other, for his or her different persuasion and practice in matters of religion, such person shall be lookt upon as a Disturber of the peace, and be punished accordingly.
>
> "But to the end That looseness, irreligion and Atheism may not Creep in under pretense of Conscience in this Province, *Be It further Enacted by the Authority aforesaid*, That, according to the

example of the primitive Christians, and for the ease of the Creation, Every first day of the week, called the Lord's Day, People shall abstain from their usual and common toil and labor, That whether Masters, Parents, Children, or Servants, they may the better dispose themselves to read the Scriptures of truth at home, or frequent such meetings of religious worship abroad, as may best suite their respective persuasions."

Noteworthy throughout these enactments is the injunction that no person shall be compelled to frequent or maintain any religious worship, place or ministry. A more careful and complete disassociation from an establishment of religion can hardly be imagined, and it would seem to be a major contradiction to proceed from this to conclude that the Sunday abstinence provisions themselves respected an establishment.

The first significant change in the Pennsylvania Sunday Law came with the Act of 1705-6 which became law after October 24, 1709:

"Be it enacted, that according to the example of the primitive Christians, and for the ease of the Creation, every First day of the week, commonly called Sunday, all people shall abstain from toil and labor; that whether, masters, parents, children, servants or others, they may the better dispose themselves to read and hear the Holy Scriptures of Truth at home, and frequent such meetings of religious worship abroad as may best suit their respective persuasions. And that no tradesman, artificer, workman, laborer or other person whatsoever shall do or exercise any wordly business or work of their ordinary callings on the

First day or any part thereof (works of necessity and charity only excepted) upon pain that every person so offending shall, for every offense, forfeit the sum of twenty shillings, to the use of the poor of the place where the offense was committed; being thereof convicted before any justice (either upon his view, confession of the party, or proof of one or more witnesses), and the said justice shall give a warrant, under his hand and seal, to the next constable where such offense shall be committed, to levy the said forfeiture or penalty by distress and sale of the offender's goods and chattels, rendering to the said offender the overplus of the money raised thereby.

"Provided always, That nothing in this act contained shall extend to prohibit the dressing of victuals in families, cook-shops or victualling-houses, or to water-men landing their passengers on the First day of the week; nor to butchers their killing and selling of meat, or fishermen from selling fish on the morning of the First day of the week, in the Fourth, Fifth and Sixth months, called June, July and August, nor to the crying of milk before nine of the clock in the morning, or after five in the afternoon.

"Provided, also, That no person shall be impeached, presented or molested for any offense before mentioned in this act, unless he or they be prosecuted for the same within ten days after the offense committed.

"And be it further enacted, That no person or persons on the First day of the week shall serve, execute or cause to be served or executed, any

writ, precept, warrant, order, judgment or decree (except in the case of treason, felony or breach of the peace), but that the serving of any such writ, precept, warrant, order, judgment or decree shall be void to all intents and purposes whatsoever; and the person or persons so serving or executing the same shall be as liable to the suit of the party grieved, and to answer damages to him for doing thereof, as if he or they had done the same without any writ, precept, warrant, order, judgment or decree at all.

"And be it further enacted, That all persons who are found drinking and tippling in ale houses, taverns or other public-house or place on the First day of the week, commonly called Sunday, or any part thereof, shall, for every offense, forfeit and pay one shilling and six Pence to any constable that shall demand the same, to the use of the poor. And all constables are hereby empowered, and by virtue of their office required to search public-houses and places suspected to entertain such tipplers, and them when found quietly to disperse; but in case of refusal, to bring the persons so refusing before the next justice of the peace, who may commit such offenders to the stocks, or bind them to their good behavior, as to him shall seem requisite. And the keepers of such ale-houses, tavern or other public-house or place as shall countenance or tolerate any such practices, being convicted thereof by the view of a single magistrate, his own confession, or the proof of one or more credible witnesses, shall, for every offense, forfeit and pay ten shillings, to be recovered as and for the uses aforesaid.

"Provided always, That nothing in this act be construed to prevent victualling-houses or other public-house or place from supplying the necessary occasion of travelers, inmates, lodgers or others on the First day of the week with victuals and drink in moderation, for refreshment only; of which necessary occasion for refreshment, as also moderation, the magistrate before whom complaint is made shall be judge, any law, usage or custom in this province to the contrary notwithstanding."[23]

This lengthy act remained intact until passage of the Act of March 30, 1779.

[§1] "Be it enacted, That if any person shall do any kind of work of his or her ordinary calling or follow or do any worldly employment or business whatsoever on the Lord's Day commonly called Sunday (works of necessity and mercy only excepted) or shall use or practice any game, play, sport or diversion whatsoever on the said day and be convicted thereof before any justice of the peace each and every person so offending shall for every such offense be fined the sum of three pounds to be levied by distress and sale of the offender's goods and chattels by warrant under the hand and seal of the said justice; or in case the offender shall have none he or she shall be committed to the common goal or workhouse of the county there to remain without bail or mainprise . . . the term of ten days.

[Sec. 2] "Provided always, That nothing in this act contained shall be construed to prohibit

[23] 2 Stats. at Large of Pa. Ch. CXIX, pp. 175-7.

the dressing of victuals in private families; bake houses or house of [public] entertainment, or to watermen landing their passengers on the Lord's day, commonly called Sunday, nor the selling of milk before nine of the clock in the morning, or after five in the afternoon of the said day."[24]

Currency depreciation led to a new act on Sept. 25, 1786.

"Be it enacted, That from and after the first day of August next, if any person shall do or perform any worldly employment or business whatsoever on the Lord's day, commonly called Sunday, (work of necessity and charity only excepted) or shall use or practice any unlawful game, hunting, shooting, sport or diversion whatsoever on the same day and be convicted thereof, every such person so offending shall for every such offense forfeit and pay the sum of thirty shillings to be levied by distress or in case he or she shall refuse or neglect to pay the sum or goods and chattels cannot be found whereof to levy the same by distress he or she shall suffer six days imprisonment in the house of correction of the proper county.

"Provided always, That nothing herein this act contained shall be construed to prohibit the dressing of victuals in private families, bake-houses, or in lodging houses, inns and other houses of entertainment for the use of sojourners, travelers or strangers, or to hinder watermen from landing their passengers, or stage coaches or stage wagons from carrying travelers (hav-

[24] 9 Stats. at Large of Pa. 333.

ing the consent of a justice of the peace upon extraordinary occasions) on the Lord's day [commonly] called Sunday nor [to] the delivery of milk or other necessaries of life before nine of the clock in the forenoon nor after five of the clock in the afternoon of the same day."[25]

The Act of 1786, soon due to expire by its own terms; the General Assembly passed the Act of April 22, 1794.[26] This act was little changed from its predecessor (the fine of thirty shillings changed to four dollars and the exception for ferrymen added), and it survived until codified as part of the Act of June 24, 1939, Pamphlet Laws 872, §699.4, one of the statutes attacked here by appellants.

This lengthy recital has been engaged in, first, to show the history of Pennsylvania's basic Sunday Law (and the lack of history of the 1959 act); second, to indicate the context of non-establishment and religious freedom in which it grew; and third, to refute appellant's quote (appellant's brief, p. 21) from *Commonwealth v. Pedano*, 33 D. & C. 551, as to the source of the Act of 1794 (the lower Pennsylvania court seemed unduly impressed by one pressure group's activities rather than 112 years of history and the imminent expiration of the Act of 1786).

Appellant's overexertion in this respect is illustrated further by its reference (appellant's brief, p. 22) to legisaltive protection of the Christian Sabbath in 1794 being necessarily derived from the legislator's oath contained in the Constitution of 1776;

[25] 12 Stats. at Large of Pa. 313, 314.
[26] 3 Sm. L. 178, 81.

First, the Constitution of 1776 was no longer in force in 1794, having been replaced by the Constitution of 1790. Second, the Constitution of 1790 contained an oath provision for legislators as follows, Article VIII):

> "Members of the general assembly, and all officers, executive and judicial, shall be bound, by oath or affirmation, to support the constitution of this commonwealth, and to perform the duties of their respective offices with fidelity."

Third, the Constitution of 1790 (Article IX) contained a broad and sweeping declaration of rights, §3 of which reads:

> "That all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own consciences; that no man can of right be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent; that no human authority can, in any case whatever, control or interfere with the rights of conscience; and that no preference shall ever be given, by law, to any religious establishments or modes of worship."

This clause has existed, substantially in verbatim form, ever since its initial promulgation in the Constitution of 1790.

It appears as §3 of Article IX in Pennsylvania's Constitution of 1838 and as §3 of Article I in Pennsylvania's present basic document, the Constitution of 1873.

A further example of appellant's failure to meet this issue realistically is seen in its truncated ref-

erence to Christianity being part of the common law of Pennsylvania (appellant's brief, p. 22). The case, most often cited, is *Updegraph v. The Commonwealth*, 11 S. & R. 394 (1824), wherein the Pennsylvania Supreme Court considered an appeal from a conviction for blasphemy (and, incidentally, reversed the conviction). Here is the full passage from which the quoted words are taken:

> "Christianity, general Christianity, is and always has been a part of the common law of Pennsylvania; Christianity, without the spiritual artillery of European countries; for this Christianity was one of the considerations of the royal charter, and the very basis of its great founder, William Penn; not Christianity founded on any particular religious tenets; not Christianity with an established church, and tithes and spiritual courts; but Christianity with liberty of conscience to all men." 11 S. & R. 394, 399

Even this Court has expressly recognized that Pennsylvania's courts do not assert that Christianity is established as the legal religion. Justice Story stated it forthrightly in *Vidal v. Girard's Executors*, 43 U.S. (2 How.) 126 (1844):

> "It is also said, and truly, that the Christian religion is a part of the common law of Pennsylvania. But this proposition is to be received with its appropriate qualifications, and in connection with the bill of rights of that state, as found in its constitution of government. The constitution of 1790 * * * expressly declares [quoting Art. IX, §3, supra]. Language more comprehensive for the complete protection of ev-

ery variety of religious opinion could scarcely be used; and it must have been intended to extend equally to all sects, whether they believed in Christianity or not, and whether they were Jews or infidels. So that we are compelled to admit that although Christianity be a part of the common law of the state, yet it is so in this qualified sense, that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public. Such was the doctrine of the Supreme Court of Pennsylvania in Updegraff v. The Commonwealth, 11 Serg. & R. (Pa.) 394." 43 U. S. (2 How.) 126, 198-9.

Without exception, this non doctrinaire approach to religious sentiment represents the outer limits to which Pennsylvania has ever gone. All early justifications of Sunday laws go no further in their religious recognition than to uphold these laws as an added feature of the guarantee of free exercise of religion. Both early and late, Sunday laws have been supported, also, as being essentially civil law. (discussed below, part C) Because appellees do not believe that this demarcation between the religious and the civil is as clearcut as some Sunday law supporters would have it, they have discussed the establishment of religion question as well. Nevertheless, appellees submit that Pennsylvania's extended history of religious liberty, its firm undeviating adherence to non-establishment and its devotion to tolerance and free expression of belief compel the conclusion that its Sunday laws can not be and are not laws respecting an establishment of religion.

C. Sunday Laws Serve a Valid and Useful Civil Purpose Consistent with a State's Legislative Power to Protect the Health, Safety, Welfare and Morals of Its Citizens

All of the discussion thus far has proceeded in recognition of the apparent religious origin of Sunday laws and of their place under the constitutional limitations upon the establishment of religion. However, Sunday laws have also been accepted and upheld as civil laws providing a day of rest for the individual. Before this understanding received clear expression from the courts of Pennsylvania, it was foreshadowed by the decision in *Commonwealth v. Wolf*, 3 S. & R. 48 (1817), where conviction of a Philadelphia Jew for working on Sunday was sustained against the assertion that the Sunday law of 1794 offended Article IX, §3, of the Pennsylvania Constitution of 1790. The court held that a law designed to remind people of their religious duties and to provide a day of rest for the worker was a valid one.[27]

Specht v. The Commonwealth, 8 Pa. 312 (1848), directly met the contention of a member of the Seventh Day Baptists that the Act of 1794 violated Article IX, §3, of the State Constitution. While reiterating the breadth of religious freedom given to the citizens of Pennsylvania, the court pointed out that gen-

[27] *Wolf and Whiteman*, op. cit., supra, n. 21, at p. 234, relate the amusing story of another Jew, Joseph S. Cohen, then Prothonotary of the Supreme Court of Pennsylvania, who, when found at work one Sunday, replied to the objector, "Sunday is *dies non ju.*"

eral laws passed for the welfare of all persons had to be obeyed, that the legislature has power to fix a day of rest and that Sunday was reasonably chosen since such a choice accorded with the day most people would themselves choose as a day of rest. The Act of 1794, the court continued, is a civil regulation, commanding all to refrain from labor.

No succeeding appellate court decision in Pennsylvania has deviated fundamentally from this modern view of Sunday legislation. The civil purpose of these laws is well established despite their religious origin and despite Sunday's exalted stature within the Christian theology. It is this fact, together with the lack of any feature bringing Sunday laws within the constitutional prohibitions regarding religious establishment, which the two lower court judges in Pennsylvania failed to recognize in their recent opinions (appellant's brief, pp. 41a-48a) and which make those opinions isolated examples in the jurisprudence of Pennsylvania.

This Court itself has recognized the civil nature of Sunday laws. First, in *Soon Hing v. Crowley*, 113 U.S. 703, it said:

> "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor." 113 U.S. 703, 710

Then in *Hennington v. Georgia*, 163 U.S. 299, the Court stated:

"In our opinion there is nothing in the legislation in question which suggests that it was enacted with the purpose to regulate interstate commerce, or with any other purpose than to prescribe a rule of civil duty for all who, on the Sabbath day, are within the territorial jurisdiction of the State. It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease. It is not for the judiciary to say that the wrong day was fixed, much less that the legislature erred when it assumed that the best interests of all required that one day in seven should be kept for the purpose of rest from ordinary labor. The fundamental law of the State committed these matters to the determination of the legislature. If the law making power errs in such matters, its responsibility is to the electors, and not to the judicial branch of the government. The whole theory of our government, Federal and State, is hostile to the idea that questions of legislative authority may depend upon expediency, or upon opinions of judges as to the wisdom or want of wisdom in the enactment of laws under powers clearly conferred upon the legislature." 163 U.S. 299, 304

Appellant's contention (appellant's brief, p. 29) that these opinions are irrelevant because of the absorption of the guarantees of the First Amendment by the Fourteenth misses the point. This expansion of constitutional restrictions upon the states would still not affect a properly enacted civil regulation; and both *Soon Hing* and *Hennington* explicitly characterized Sunday laws as civil regulations. No reason exists now to change this conclusion in 1960, and a similar characterization obviously answers the religious objection despite its greater field of operation.

Contemporary expressions of opinion by this Court are lacking in the sense that no full scale opinion has been handed down. However, numerous times in the past decade the court has rendered per curiam dismissals of appeals. These dismissals were, of course, dispositions on the merits of the questions presented.[28] The decisions noted are *Friedman v. New York*, 341 U.S. 907 (in which a direct challenge to the older cases was made); *State v. Towery*, 347 U.S. 925; *Gundaker Central Motors v. Gassert*, 354 U.S. 933; *Grochowiak v. Pennsylvania*, 358 U.S. 47; *Kidd v. Ohio* and *Ullner v. Ohio*, 358 U.S. 131. Virtually every conceivable question raised by the attacks on Sunday laws were raised in these appeals, yet none resulted in a holding that Sunday laws are invalid.

Thus, there exists a long history of treatment of Sunday laws by the courts as civil regulations. The power of the legislature to require a day free from the daily ordinary labor of a person seems unquestionable, and appellees do not understand appellant's

[28] *Ohio ex rel. Eaton v. Price*, 360 U.S. 246.

to assert that such may not be done. Moreover, the distinction between refraining from one's usual labor and performing such labor is the issue, not the distinction between absolute rest and labor. The performance of recreational activities seems equally, if not more, conducive to the refreshment of body and mind as does pure rest.

Arguments advanced by amicus curiae and suggested by appellants that other laws effectively provide the need for rest required by the worker do not negate the effectiveness and validity of Sunday laws. The legislative power is charged initially with working out the basic problems of the social welfare of the citizenry, and that it may act multifariously hardly seems sufficient reason to void its enactments or to require a court to say one act is valid and another void. Statutory recognition of the basic forty hour week[29] has certainly lessened the possibility of overwork, yet can it be said that a further reduction to thirty-five hours for certain workers would be unnecessary and invalid?

Similarly, amicus curiae has suggested that satisfactory alternatives exist whereby day-of-rest statutes may operate without depriving a person of his liberty to choose his own day. It is undoubtedly true that a state can enact legislation requiring one day of refraining from one's usual labor without specifying the day, but this power to act is far from a constitutionally compelled result. When it is asserted that this alternative must be chosen because it involves less interference with constitutionally granted liberties, there is presented simply a question-beg-

[29] 52 Stat. 1063 (1938), 29 U.S.C. §207.

ging argument, an argument which assumes that Sunday laws infringe constitutional rights. *Dean Milk Co. v. Madison*, 340 U.S. 349, cited in support of this assertion, is a case in which an otherwise proper milk regulation was found to erect economic barriers violative of the Commerce Clause where an alternative regulatory procedure would have provided the same protection without such violation. It was the violation of the Commerce Clause which invoked the "satisfactory alternative" doctrine, not the existence of the alternative alone which required it to be followed.

An effective analysis of the real difficulties with this alternative suggestion has been carefully made in a note in 73 Harv. L. Rev. 729 (1960). To summarize the objections there made to the one-day-of-rest-in-seven statute: (1) enforcement would be rendered more difficult; (2) the efficacy of the one day in which an atmosphere of general relaxation prevails would be diluted and its salutary effects diminished; and (3) opportunities for interpersonal contact would be lessened. Is a court to say that the legislature has erred in determining that these values, enhanced by specifying Sunday as the day of rest, are not valid ones as opposed to the value of allowing one to choose his own day of rest?

The second suggested alternative—that of exempting from Sunday laws persons who observe another day—is equally subject to criticism. Whatever feelings of difference exist in a non-Sunday observer would not be diminished because the majority of persons would continue to refrain from their ordinary labor on Sunday. Non-business contacts between

Sunday and non-Sunday observers would become more difficult. The general beneficial effects of having one day of relative quiet and relaxation would be diminished. Determination of the sincerity of an individual's belief in another day as a day of rest could pose a difficult problem. Prejudice against non-Sunday believers might be accentuated, particularly among those Sunday observers in commercial competition with those persons who remain open on Sunday; and interfaith contacts would be rendered more difficult.

None of these arguments are recited to prove that the possible alternatives to Sunday laws are themselves invalid. Appellees believe that all are valid exercises of the state's police power but that none represents a so-called "alternative" which perforce must be utilized[30] because another infringes constitutional liberties. The state's interest in providing a time for relaxation, for withdrawal from daily labor, is a real one; how the state effectuates its policy in this regard is primarily the function of its legislature, not the courts even if the latter would choose another method. Resort to Sunday laws directly produces benefits and effects values equally, if not more, compelling than the other methods; and Pennsylvania's approach cannot be said to be destructive of these benefits and values.

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[30] The Record (100) shows rather plainly that this appellant actually has no interest in any alternative which would affect its full-scale operation seven days a week.

II. THE CLASSIFICATION OF PROHIBITED ACTIVITIES AND THE FINES CONTAINED IN THE PENNSYLVANIA ACT OF AUGUST 10, 1959, PAMPHLET LAWS 630, DO NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. The Pennsylvania Statute Does Not Discriminate Invidiously in Violation of Appellant's Right to the Equal Protection of the Laws

Appellees assume that this phase of appellant's attack is limited to the specific limitations contained in the 1959 Act and does not extend to the general exceptions for works of necessity and charity, etc. in the 1939 Act. Both appellant's statement of questions (appellant's brief, p. 6) and its discussion (appellant's brief, pp. 35-41) support this assumption; and the older exceptions seem reasonable on their face.

The 1959 Act prohibits the sale at retail of certain specified items. Appellant's attack takes two approaches: (1) that only retail sales are restricted and (2) that only specified commodities are singled out for action: Then, by setting forth a list of horrors comparing what can and cannot be sold, appellant rests its case.

We suggest that the problem is more complex than this. First, this Court long ago explained its position with regard to the classification of objects in a

regulatory statute. In *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-9, these rules were established:

a. A state may classify as long as its action is not purely arbitrary.

b. A reasonable classification is not invalid because in practice it results in some inequality.

c. If any facts would sustain a classification, the existence of such facts at the time of the enactment must be assumed.

d. One who attacks a classification bears the burden of showing that it is unreasonable and arbitrary.

This statement of principle has never been altered. Has appellant met its burden?

The Pennsylvania statute operates equally upon all persons similar situated. This is an act directed against the sale of specified commodities, not against the operation of particular kinds of business where the same object may be sold by both a prohibited and a non-prohibited enterprise, thus giving the latter a possibly unwarranted competitive advantage. By aiming at commodities this objection is avoided and the principle of equality sustained.[31]

Prima facie, it does not seem arbitrary for the statute to limit its restriction in the manner seen here. The Pennsylvania General Assembly may well have concluded that all sales at wholesale and retail sales of other commodities did not pose a problem requiring action by it. The very careful delineation

[31] A collection of state court decisions on this aspect of Sunday laws may be found at 57 A. L. R. 2d 959.

of goods in the statute suggests that the legislature knew exactly what evils existed and were to be remedied. Its approach reflects a zeal to reach only as far as it felt necessary and not to impose blanket prohibitions where they were not needed. No answer to this is found in appellant's brief.

Second, appellant is faced with a specific finding by the District Court that the "circumstances attending or existing at the time of its enactment affirmatively suggest a rational basis for this legislative action" (R. 284). The District Court went on to explain that the 1939 Sunday law was generally obeyed by retailers in Lehigh County until the very recent opening of large suburban businesses like appellant's, an event which initiated violations and threatened more. The four dollar fine, according to testimony at the legislative hearings on the proposed act, was too small to deter violations. Finally, the District Court found the commodities covered in the 1959 Act were the principal commodities sold by the new suburban establishments. All of these findings suggest that not only can we assume a state of facts making passage of this legislation reasonable, but we can also discern the presence of actual facts justifying the classification found in the act.

Third, this Court has indicated its reluctance to overturn legislative classification, no matter how narrow. In *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, the Court was confronted with an attack by local opticians upon a state statute regulating visual care. One objection made by the opticians was that the act applied to them but not to sellers of ready-to-wear glasses. The Court answered:

"The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Tigner v. Texas, 310 U.S. 141. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. Semler v. Oregon State Dental Examiners, 294 U.S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others. A. F. of L. v. American Sash & Door Co., 335 U.S. 538. The prohibition of the Equal Protection clause goes no further than the invidious discrimination." 348 U.S. 483, 489.

Previously, in *Hughes v. Superior Court of California*, 339 U.S. 460, the Court upheld a contempt conviction for violation of an injunction prohibiting picketing to compel the hiring of Negroes in these words:

"A State is not required to exercise its intervention on the basis of abstract reasoning. The Constitution commands neither logical symmetry nor exhaustion of a principle. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' Metropolis Theatre Co. v. Chicago, 228 U.S. 61. A State may 'direct its law against what it deems the evil, as it actually exists without covering the whole field of possible abuses, and it may do so none the less that the forbidden act does not

> differ in kind from those that are allowed.' Central Lumber Co. v. South Dakota, 226 U.S. 157." 339 U.S. 460, 468.

Considering, then, that no business is placed in a preferred position by this statute, that the court below expressly found that a rational basis existed for the legislative action and that this Court requires one who asserts the invalidity of a classification to show an invidious discrimination, can we conclude that the Act of August 10, 1959, violates the equal protection clause? On all but three counts appellants believe we cannot.

B. The Pennsylvania Statute Does Not Violate the Due Process Clause of the Fourteenth Amendment

1. The Act is reasonably calculated to meet an evil subject to legislative action.

The reach of the due process clause in the area of classifications in statutes adds little to the protection granted by the equal protection clause: it simply provides an additional weapon to strike down patently arbitrary legislation. Here, we have already seen that the purpose of the act itself and the classification contained therein were directed at known evils: large-scale violations of law in the field of retail selling, especially of the commodities listed in the act. It is hardly possible to state that this regulatory statute deprives appellant of due process of law under these circumstances.

This Court has emphasized the burden which must be met by one seeking to prove that a state statute regulating business violates due process. In *Williamson v. Lee Optical of Oklahoma, Inc.*, supra, another phase of the attack on the statute there involved centered upon its unnecessary qualities. This Court said:

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particu' r school of thought." 348 U.S. 483, 488.

Appellees do not ask the Court to indicate agreement with the legislative means here adopted to prevent significant intrusions upon a traditional valid and well-defined state policy; they ask only that the Court recognize the propriety of these means to effect a solution to the problem and the validity of the goal sought.

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2. The fines provided by the Act are not oppressive and discriminatory.

Both in its jurisdictional statement (p. 6) and its brief (p. 6) appellant states one of the questions presented as that arising from a possible violation of the Fourteenth Amendment by "oppressive and discriminatory" fines. Not a word on this question can be found in either paper book submitted by appellant, and it seems likely that appellant has abandoned it. However, appellees do not believe that any serious objection can be made, anyway.

The Act of 1959 provides for a fine not exceeding one hundred dollars ($100) for the first offense of making a sale or offering to sell at retail on Sunday and for a fine not exceeding two hundred dollars ($200) or thirty days imprisonment in default of payment for a second or subsequent offense committed within a year of conviction for a first offense.

With regard to state police regulations and penalties thereunder this Court has stated:

> "* * * there is no inhibition upon a state to impose such penalties for disregard of its police regulations as will insure prompt obedience to their requirements. * * * And the extent of the

penalties which should be imposed by the state for any disregard of its legislation in that respect is a matter entirely within its control.[32]

Where utility rates are involved and the penalty for violation is so severe that the utility is intimidated from testing the validity of the rates by court proceedings, this Court has said that the penalty (and the statute, therefore) violate the Constitution.[33] Whether this result follows from application of the equal protection clause or the due process clause, there is no reason to extend it to a situation like the present one. We are not confronted with a rate-making statute; nor, obviously, has appellant been intimidated from resorting to the courts. Pennsylvania should be left free to determine the appropriate penalties for violations of its Sunday law as long as its determination is not clearly unreasonable. The fines in the Act here questioned do not violate this principle.

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[32] *Minneapolis & St. Louis R. Co. v. Emmons*, 149 U.S. 364, 367.

[33] *Ex Parte Young*, 209 U.S. 123.

III. APPELLANT IS ENTITLED TO NO RELIEF ON THE GROUND THAT APPELLEE McGINLEY'S METHOD OF ENFORCEMENT OF THE PENNSYLVANIA SUNDAY LAWS VIOLATED APPELLANT'S RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. Termination of Appellee McGinley's Term of Office on the First Monday of January 1960 Likewise Terminated the Need for and Effect of Injunctive Relief Against McGinley Based Upon His Method of Enforcement of the State Statute

Appellee McGinley served as District Attorney of Lehigh County, Pennsylvania, from January 2, 1956, until January 4, 1960. The termination date is confirmed by the Record (303), and the former can be determined by reference to the relevant Pennsylvania statute concerning the term of a district attorney.[34] On January 8, 1960, appellant petitioned the court below to order the "substitution of [appellee] George J. Joseph . . . as an additional defendant . . ." (R. 303). As its reasons for this request appellant referred to the termination of McGinley's term of office (R. 303), the assumption of office by Joseph (R. 304) and the necessity of the substitution so that appellant could continue its action with regard to the constitution-

[34] Act of August 9, 1955, Pamphlet Laws 323, §1401; 16 Pa. Stat. Ann. §1401.

ality of the statutes (R. 304). It also stated (R. 304) that it had no reason to believe that Joseph would enforce the statutes in a discriminatory manner.

Appellee's counsel simply overlooked the technical nicety of appellant's phrasing, "substitution . . . as additional defendant," and consented to the motion. Obviously, it was proper to substitute Joseph for McGinley in order to continue the suit insofar as the alleged invalidity of the statutes is involved; and Rule 25 (d) of the Federal Rules of Civil Procedure expressly provides for a situation like this one. That Rule, however, speaks of substitution only with regard to the question of an invalid law, remaining absolutely silent on the question of invalid enforcement.

It is appellees' contention that the cause of action alleged by appellant on the issue of enforcement necessarily abated when McGinley left office.[35] Several reasons compel this conclusion. First, absent a statute or Rule 25 (d), this Court has held that actions against public officers abate upon their death or retirement.[36] Second, nothing in Rule 25 (d) speaks of retaining or substituting as a party a public officer where the issue relates only to his discriminatory enforcement of a statute, presumed valid. Third, even if that Rule could be stretched to cover this case, it requires an allegation that the invalid enforcement method will continue. This fact appellant expressly denied. Fourth, no authority anywhere exists for the appearance in a case of a "substituted additional defendant" except, possibly, where a third

[35] Cf. *Ex Parte LaPrade*, 289 U.S. 444.
[36] *Pullman Co. v. Knott*, 243 U.S. 447.

party joinder has previously occurred. Fifth, and most compelling, appellees submit, is the fact that no viable relief can possibly be given as to this aspect of the case.

Assume that the statute itself is found valid in all respects. We are then left with a claim for equitable relief based only upon discriminatory enforcement. No monetary damages are claimed by appellant against McGinley. This situation means that appellant is asking this Court to pass upon its right to obtain an injunction against a public official who is no longer a public official. An injunction against McGinley is meaningless since he is in no position to enforce the statute; an injunction against Joseph is equally meaningless since he never did enforce the statute prior to this suit and since appellant has explicitly denied any suggestion that Joseph would enforce discriminatorily. The Court would be operating in a vacuum.

Appellant's only suggestion in support of the continuation of this phase of the appeal is its reference to pending criminal prosecutions (appellant's brief, p. 42). There are several answers to this contention. First, there is nothing in the record raising a question concerning these prosecutions. Second, any valid defense which any person may have in these prosecutions may easily be raised in the criminal proceedings themselves. Third, appellant's reference to *People v. Harris* (appellant's brief, p. 42) seems misplaced. The cited report of that case appears to summarize its holding as requiring a trial court to allow the defendant in a criminal case to introduce evidence of discriminatory enforcement as a defense to his pros-

ecution. The California court also notes that such an allegation may be made in an equitable proceeding. Both of these statements are unimpeachable; but neither has anything to do with the problem of procedure when the prosecuting attorney is no longer in office.

Appellant's position, in effect, would require this Court to render an advisory opinion. No real controversy presently exists in this suit for an injunction with regard to appellee McGinley's conduct as District Attorney of Lehigh County, and this Court should not go beyond the real questions of the case to reach a decision on a matter no longer an issue.

B. Even If the Question of Enforcement Be Considered, Appellee McGinley Did Not Enforce the Pennsylvania Sunday Laws in an Unconstitutional Manner

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Assuming, however, that the enforcement issue should be decided, there has been no violation of appellant's constitutional rights. Of course, no controversy at all can arise over the 1959 Sunday law because McGinley was restrained from enforcing it before it became effective. Appellant's allegations in this respect stem from enforcement of the 1939 law only.

The court below found as a fact that enforcement of the Sunday law in Lehigh County had been lax for some time (R. 284). It also found that McGinley, beginning in 1957, "made substantial and frequent efforts by admonition and arrest" to enforce the law against numerous retail establishments, including ap-

pellant's (R. 284-285). It decided that no basis existed in the record for predicting what enforcement would occur under the 1959 Act and that enforcement of that Act while violations under the 1939 Act went unpunished did not deny equal protection of the laws to the appellant although it might subject the district attorney to sanctions for violation of his public duty (R. 285). The lower court also indicated that failure to enforce the 1939 law against some Sunday activities while enforcing it against others created no more of a constitutional issue than the statutory classification itself (R. 285).

On all of these points except the last appellees are in agreement with the District Court. As to the last conclusion reached, appellees do feel that selective enforcement of the 1939 Act could raise a constitutional question regardless of the legislative discrimination in the statute itself. What a legislature may do should not be the criterion for determining what a district attorney may do in enforcing a law. However, simply to reach this conclusion does not solve anything, anymore than does the invocation of the phrase "selective enforcement" to describe a particular pattern of official conduct.

In this area what must be reviewed is the intent and purpose of a policy of unequal enforcement. Few constitutional doctrines are so dominated by a single case as this one, but *Yick Wo v. Hopkins*, 118 U.S. 356, remains the first and last, if not quite the only, word. The Court there summed up the vice of discrimination in enforcement in these words:

> "Though the law itself be fair on its face and impartial in appearance, yet if it is applied and

> administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." 118 U.S. 356, 373-4

A later-day statement of the principle appears in *Snowden v. Hughes*, 321 U.S. 1:

> "The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination. This may appear on the face of the action taken with respect to a particular class or person, cf. McFarland v. American Sugar Ref. Co. 241 US 79, or it may only be shown by extrinsic evidence showing a discriminatory design to favor one individual or class over another not to be inferred from the action itself, Yick Wo v. Hopkins, 118 US 356. But a discriminatory purpose is not presumed, Tarrance v. Florida, 188 US 519, there must be a showing of 'clear and intentional discrimination,' Gundling v. Chicago, 177 US 183 . . ." 321 U.S. 1, 8.

In light of these statements, what does the present case reveal? It reveals, first, that appellant entered the Allentown, Pennsylvania, market knowing that state law prohibited Sunday business activity and intending to remain open seven days a week (R. 97-99). In justification of its knowing violation of law,

it depended upon its predetermined findings that enforcement through the years had been negligible if it existed at all (R. 98-99).

On the other hand, McGinley testified that the area was generally quiet on Sunday (R. 117) although he was long aware that certain recreations, industries and corner grocery stores were open (R. 116). After he became District Attorney, this pattern continued until appellant opened its store in the fall of 1957 with considerable fanfare (R. 117); and both actual and threatened violations of the Sunday law mushroomed (R. 118). Confronted with what appeared to be an alarming and widespread defiance of law, McGinley moved to prevent an upheaval (R. 119-124). Arrests wre made not only at appellant's but also at other stores (R. 122) although no arrests took place in appellant's food, drug and restaurant area which were legally permitted to open (R. 122). Other arrests were made elsewhere (R. 123); and, subsequently, general compliance with the law, except by appellant, followed (R. 123). Undoubtedly, as the Record shows (223-249), violations occurred constantly in the smaller stores throughout the community; and McGinley, faced with the impossibility of being everywhere at once (R. 126), stated that the cooperation of all public agencies and citizens was requested (R. 126) and that his office would prosecute any appeals from aldermanic hearings (R. 125).

No question exists concerning the fact that some of the local industries maintained their plants on Sunday (R. 133), that various recreational activities were carried on (R. 134), and that newspapers were published R. 165). McGinley felt that for a number

of reasons it was doubtful whether enforcement of the Sunday law against these operations would be sustained (R. 134, 135, 141-142).

On this state of facts appellant submits one ground for its charge of discriminatory enforcement. Its second ground, ignored in its brief, but mentioned briefly in its jurisdictional statement (n.2, p.8), is that McGinley was "improperly induced to [discriminate] by Max Hess . . . appellant's principal business competitor." Appellant proves nothing in this respect. The Record shows, as McGinley freely stated, that McGinley received some legal fees from Max Hess or his store (R. 135-137) over a four year period, the total amounting to possibly $1200.00, and that McGinley took part in a real estate transaction with Mr. Hess in which he made a fee and some profit (R. 137-141, 156-161). On the other hand McGinley testified, in effect, that he told Max Hess that he would enforce the law against Hess' store as well as appellant's (R. 142).

Having received legal fees from a business man and having sold real estate to him do not amount to being bribed by that business man without some additional proof. Receiving a bribe is a crime in Pennsylvania[37] as is corrupt solicitation,[38] and both may involve the influencing of a public officer in connection with his official duties by payment of money. A district attorney in Pennsylvania is permitted to en-

[37] Act of August 9, 1955, Pamphlet Laws 323, §1405. 16 Pa. Stat. Ann. §1405; Act of June 24, 1939, Pamphlet Laws 872, §303, 18 Pa. Stat. Ann. §4303.

[38] Act of June 24, 1939, Pamphlet Laws 872, §304; 18 Pa. Stat. Ann. §4304.

gage in private practice not in actual conflict with his public duties and it is obvious that he may receive private legal fees from or engage in business with persons who have an independent interest in having these duties performed without committing a crime. Appellant's allegations in the present case require an ultra-credulous imagination to receive any support. There is good reason for this. The allegations are simply untrue.

Does the record show, therefore, an administration of a statute with an "evil eye" and with "purposeful discrimination"? Appellees submit that it does not, that McGinley pursued the most rational enforcement policy within his power and resources, that appellant's attack on Max Hess' activities is legally groundless and that its insinuations concerning McGinley in this respect are not entitled to serious consideration. On all counts no showing of unconstitutional enforcement has been made. The explanation is simple: there was none.

IV. THE DISTRICT COURT DID NOT ERR IN DETERMINING NOT TO PASS UPON THE CONSTITUTIONALITY OF THE 1939 PENNSYLVANIA SUNDAY LAW

Confronted with passage of the 1959 statute prior to final hearing and with inclusion of that statute in appellant's attack, the court below concluded that it should refrain from passing upon the 1939 Sunday Law until its application to appellant or another similar enterprise was clarified by the state courts. Several reasons were given by the District Court for this determination:

First, the court felt that insofar as the same activities are covered by both laws, the newer act superseded the 1939 statute. In this, it clearly seems to be right. Pennsylvania's "Statutory Construction Act"[39] contains two provisions supporting this view. Section 63[40] requires that a general provision in a law give way to a conflicting special provision in a later law. Section 66[41] rules that a newer law shall prevail over a conflicting older law. Also, the Pennsylvania Supreme Court has held that a specific penal provision supersedes a general one where both apply to the same prohibited act. *Commonwealth v. Brown*, 346 Pa. 192. This combination of statutory and case law, the District Court held (R. 275), at the very least made application of the 1939 Act to appel-

[39] Act of May 28, 1937, Pamphlet Laws 1019, §§1-101, 46 Pa. Stat. Ann. §§501-601.

[40] 46 Pa. Stat. Ann. §563.

[41] 46 Pa. Stat. Ann. §566.

lant an uncertain things to be best resolved by the state courts.

Second, and possibly even more compelling, the District Court found (R. 275-276) that appellant could show no present need for protection with regard to the 1939 Act. As that Court stated:

> "The evidence does not show and the court does not find any present or continuing threat to enforce against plaintiff's retail selling the . . . 1939 statute . . ." (R. 275)

What the record does show, in fact (R. 112-115), is that appellant continued to open on Sunday throughout 1958 even while the 1939 statute was being enforced against it and only proceeded to bring the present action when appellee indicated that he might institute conspiracy charges, a position from which he later withdrew (R. 9, 39). Whatever injury appellant suffered under McGinley's pattern of enforcement of the older law evidently seemed to it hardly worth the trouble of preventing. These two factors —the finding of no jeopardy to appellant from any enforcement of the 1939 Act and the lack of serious harm to it even under enforcement—both substantiate the wisdom of the District Court's action.

Appellant's reference in its brief (p. 42) to the fact that "less than a year before" the Pennsylvania state courts had held the 1939 Act applicable to appellant's employees is simply irrelevant. "Less than a year before" the decision in this case was a time at which only the 1939 Act existed, the 1959 statute having not yet been enacted. It seems, therefore, that the District Court acted with proper discretion and wisdom in concluding as it did; and appellees submit that its action should be affirmed.

CONCLUSION

For the reasons above stated, the final order of the District Court should be affirmed.

Respectfully submitted,
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